

City and County of San Francisco
HUMAN RIGHTS COMMISSION

Theresa Sparks
Executive Director



Edwin M. Lee
Mayor

June, 7, 2012

Mayor Edwin Lee
City and County of San Francisco
City Hall, Room 200
1 Carlton Goodlett Place
San Francisco, CA 94102

Re: HRC Response to "Assessment of the City and County of San Francisco's Performance under SF Administrative Code Chapter 14B" by Rosales Business Partners LLC dated May 14, 2012

Dear Mayor Lee:

Please find attached HRC's evaluation of the "Assessment of the City and County of San Francisco's Performance under SF Administrative Code Chapter 14B" by Rosales Business Partners LLC dated May 14, 2012 ("Rosales Report", Appendix A).

I believe there are a number of incorrect assertions in Ms. Rosales' assessment of the HRC's implementation of Administrative Code Chapter 14B that are potentially damaging to the department and, arguably, to the Director personally. It is on this basis that I met with Ms. Rosales on May 23, 2012, to give her our general impression of the assessment, offer factual corrections and provide her with a copy of an initial draft written response to her Report. I will include that response within this overall evaluation of the assessment. I believed it was important to have a discussion with Ms. Rosales *prior to* preparing our final evaluation to insure the information presented is accurate and up-to-date. I am copying Ms. Rosales on this letter and evaluation as I am hopeful she will distribute it as a replacement report to the original which, unfortunately, has already been widely disseminated.

Ms. Rosales states (almost as a side-note) that Mayor Newsom's appointment of me as HRC Director in 2009 has somehow led to the mismanagement or under-utilization of HRC's role in contract compliance and advocacy for minority/women owned businesses in San Francisco. She suggests that, based on an out-of-context statement presented in an interview, prior to the time I actually started at HRC, that I was not fully committed to minority, women-owned, small or local businesses; or to the successful implementation of 14B. That statement is incorrect.

As a transgender woman, former small business owner and, now, the only transgender department head in the history of San Francisco, I know exactly what discrimination looks like. I have faced it in every element of my life. To suggest that I would not support a program designed to address institutionalized discrimination in contracting is both mean-spirited and absurd. Further, after a 25 year career of founding, growing and managing small, privately-

owned professional services and construction management businesses, I am acutely aware of the problems facing these companies. In fact, I may be the only Director of the HRC that has experienced public contracting from the private sector. I have stated many times I support this program without qualification. I also believed then, and do so now, that a greater emphasis and more resources needed to be committed to the non-discrimination and policy programs of the HRC, even in a time of significantly decreasing budgets.

Additionally, Ms. Rosales states, there were *“instances of retaliation by department personnel when LBE’s raised questions about contracting decisions.”* Allegations of retaliation are very serious and should not even be suggested anecdotally without a specific instance being cited – particularly in a document with wide circulation such as the Rosales Report. To do otherwise is irresponsible. Further, there is absolutely no evidence or document to support such an occurrence happening during the Director’s tenure with HRC. If there is a specific charge, it should be immediately brought to the attention of the Department of Human Resources or the Mayor. HRC does not tolerate retaliation on any issue by anyone, including the Director.

Ms. Rosales also alleges that HRC’s stewardship of the LBE Ordinance has not been effective or produced results pursuant to the intent of the ordinance. I believe the results, as presented in a multitude of public documents, posted on the HRC website and contained in the detailed response to Ms. Rosales’ Sunshine Request, dated February 8, 2012, refute that allegation. As one example, in FY 2010/11, LBEs won 93% of construction contracts under \$10M awarded by the four largest construction contract awarding departments (AIR, PUC, DPW, REC). The data as presented to Ms. Rosales in HRC’s response to her Sunshine Request suggests many other similar examples exist.

This response to her assessment will address many other of Ms. Rosales’ conclusions based on only anecdotal information. If you have any questions, or clarifications, please contact me any time.

Sincerely yours,



Theresa Sparks

Executive Director

cc: Naomi Kelly, City Administrator
Michael Sweet, Chair, Human Rights Commission
Mara Rosales, Rosales Business Partners LLC

HRC Response to "Assessment of the City and County of San Francisco's Performance under SF Administrative Code Chapter 14B" by Rosales Business Partners LLC dated May 14, 2012 ("Rosales Report", Appendix A)

HRC'S RESPONSE TO ROSALES REPORT SECTION ENTITLED "INTRODUCTION"

We want to acknowledge that Ms. Rosales openly states in this section that she only used information that was "anecdotal, "publically available" from the last 3 years and provided by "stakeholders" in the local business community. She also states that she did not interview a single department head, including the HRC Director. It is unfortunate that Ms. Rosales was unable "due to the limited timeframe" to at least interview the Director or review the quarterly reports that have been posted on the HRC web site for more than 2 years, the quarterly 14B evaluations sent to the Board of Supervisors over the same timeframe, the quarterly information made available to the LBE Advisory Committee, the multiple presentations made to the HRC Commission and the detailed 2011 Annual Report widely distributed the middle of December 2011. But, be that as it may, we understand her time constraints and appreciate her willingness to allow HRC to submit factual information on the subjects from which she chose to draw her conclusions and make recommendations.

HRC'S RESPONSE TO ROSALES REPORT SECTION ENTITLED "EXECUTIVE SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS"

We agree with Ms. Rosales' conclusion that today's ordinance is a regulatory scheme that is unnecessarily complex and burdensome for the regulators, contracting departments and the businesses trying to access it. We will not comment on her statement about mismanagement of the program by HRC, only offer the information contained herein for the reader to draw their own conclusions.

We do not, however, agree that the contract compliance functions, including goal setting, set-asides, bid discounts and outreach be transitioned to contract awarding departments. Our opinion is that there needs to still be an independent contract compliance oversight agency to work with the contracting departments in the application of all functions outlined in the ordinance. Our recommendation is to go further and ultimately combine other contracting compliance functions such as those performed by OLSE and OWD/Local Hire into the same contract compliance oversight agency, resulting in a more cost effective, efficient and responsive approach to contract compliance. This new department should then be headed by a Chief Contract Compliance Officer.

We also disagree that the HRC should retain an advocacy role in that the ordinance now that it is race and gender neutral; without the operating functions, the HRC has little context to perform any meaningful outreach.

HRC'S RESPONSE TO ROSALES REPORT SECTION ENTITLED "RELEVANT BACKGROUND"

After presenting a two page back-ground on the LBE Program, Ms. Rosales finds it necessary to state, almost as a side-note, that Mayor Newsom's appointment of Theresa Sparks as HRC Director in 2009 has somehow led to the mismanagement or under-utilization of HRC's role in contract compliance and advocacy for minority/women owned businesses in San Francisco. She suggests that based on an out-of-context statement presented in an interview prior to the time the Director actually started at HRC, that she was not fully committed to minority, women-owned, small or local businesses; or to the successful implementation of 14B. That statement is incorrect.

As a transgender woman, former small business owner and, now, the only transgender department head in the history of San Francisco, the Director knows exactly what discrimination looks like. She has faced it in every element of her life. To suggest that the Director would not support a program designed to address institutionalized discrimination in contracting is both mean-spirited and absurd.

Further, after a 25 year career of founding, growing and managing small, privately-owned professional services and construction management businesses, the Director is acutely aware of the problems facing these companies, issues ranging from bonding and working capital to working with majority primes and cash flow. In fact, she may be the only Director of the HRC that has experienced public contracting from the private sector.

Finally, the Director has stated publically many times that she supports this program without qualification. She believed then, and does so now, that a greater emphasis and more resources needed to be committed to the non-discrimination and policy programs of the HRC, even in a time of significantly decreasing budgets.

HRC'S RESPONSE TO ROSALES REPORT SECTION ENTITLED "METHODOLOGY"

In this section, Ms. Morales references the short list of items she has relied upon to perform her analysis of the LBE program. Although Ms. Rosales, faced with a "narrow time window" managed to find the time to review some very general items such as the "SF Administrative Code" and the "City and County Budget Reports", she apparently did not find the time to review the quarterly reports submitted to the LBE Advisory Committee, of which she is a member, or those posted on the HRC's website. In fact, Ms. Rosales did not even find the time to review, reference or cite any of the data that HRC provided her in response to her request for public documents on February 8, 2012 – data that was directly relevant to her purported analysis of the LBE program¹. In fact, HRC provided Ms. Rosales with quarterly LBE participation

¹ Ms. Rosales made this request to HRC first as the President of the Coalition for Economic Equity and, later, as Principal of Rosales Business Partners. In her request, Ms. Rosales specifically requested contract award data for FY09-10 and 10-11 (See Appendix B). Further, had Ms. Rosales not been satisfied with HRC's response she could have simply contacted HRC directly for more information, submitted additional Sunshine Requests for Public Information or filed a complaint with Sunshine Ordinance Task Force.

reports for the last two fiscal years, along with digital files in the form of excel spreadsheets containing every single contract for which a LBE goal was set. The data provided to Ms. Rosales included prime and subcontractor award information, the local business enterprise certification status for each prime and subcontractor, by award date and by department.

HRC'S RESPONSE TO ROSALES REPORT SECTION ENTITLED "SUMMARY OF CONTROLLERS AUDIT REPORTS"

HRC's responses to the Controller's Audit reports referenced by Ms. Rosales were sent to the Controller's office and the Board of Supervisors and are publically available necessitating no additional comment from the HRC. The remarks about DiversitySF will be addressed in a later paragraph.

HRC'S RESPONSE TO ROSALES REPORT SECTION ENTITLED "COMMUNITY CONCERNS"

It is unfortunate that the Coalition on Economic Equity and Ms Rosales held community meetings without allowing HRC to attend, respond or, most importantly, supply whatever information the community felt was not readily available. HRC has always been responsive to inquiries, concerns about the implementation of 14B or communications from community members. The LBE Advisory Committee of the HRC, of which Ms. Rosales is a member, holds open, noticed, monthly meetings for the very purpose of hearing and resolving exactly those types of complaints. The full Human Rights Committee holds semi-monthly meetings at City Hall and, in every meeting, there is time set aside for the public to make comments about our programs, our chartered mission and stewardship of both. These meetings are noticed pursuant to the Brown Act. Very seldom has an LBE attended one of these meeting to either observe, ask questions about the multiple LBE program presentations, or to bring forth issues.

As mentioned before, Ms. Rosales, as both the president of the Coalition and in her position as an independent contractor, did file a sunshine request for documents in February 2012. It is our belief that we not only completely fulfilled the request, but that the documents were in a format allowing a detailed analysis. We contacted the Coalition, after sending the documents to make sure we met their needs. We did not receive any response to the contrary. Once again, HRC has posted all LBE quarterly reports for more than two years online, on its website.

Other concerns such as *"errors in ordinance interpretation by HRC staff on joint venture arrangements, poor handling of the Surety Bond program by the Director, a slow processing of complaints of discrimination, a lack of proper protest procedure for errors in a competitive process, incorrect analysis of certification procedures leading to denials of LBE certification to bona fide LBE firms, and instances of retaliation by department personnel when LBE's raised questions about contracting decisions,"* are all addressed below individually.

- ***"Errors in ordinance interpretation by HRC staff on joint venture arrangement":*** We believe our interpretations have been consistent with the Administrative Code. We would need more specific information before making a definitive statement on any one case.

- ***“Poor handling of the Surety Bond program by the Director”:*** We believe the Surety Bond Program suffered from a lack of consistent, accurate communication between the department and the consultant, Merriwether and Williams. Once this was corrected, the implementation and reporting was vastly improved. After the upcoming transition to the Risk Management Department, the Surety Bond Program will greatly benefit from the expertise of risk management professionals representing the City.
- ***“A slow processing of complaints of discrimination”:*** HRC’s processing of discrimination complaints was, in every case, pursuant to the Administrative Code and, when required, performed with the assistance of the City Attorney’s Office. If anything, the department is guilty of giving all parties involved in the complaint too much latitude in an effort to protect everyone’s due process. As an example, Ms. Rosales (as Rosales Law Partners LLP, in a letter addressed to the Director of the HRC, dated December 23, 2011, in her professional capacity representing Bay Area Concretes, Inc.) contended that a prime contractor, West Bay Builders, had violated 14B to the detriment of her client. As a result of her letter, HRC immediately commenced a confidential investigation. After an exhaustive investigation, complying with all applicable laws and ordinances, the Director concluded that a violation of 14B had occurred. Immediately prior to receiving a copy of Ms. Rosales’ assessment of HRC implementation of 14B, HRC notified the contracting agency, the prime and Ms. Rosales that the Director found in favor of the complainant, Ms. Rosales’ client. The investigation was concluded in approximately five months. Full compliance staffing would certainly expedite these investigations in the future.
- ***“A lack of proper protest procedure for errors in a competitive process”:*** HRC’s processing of complaints concerning an individual competitive process was, in every case, pursuant to the administrative code.
- ***“Incorrect analysis of certification procedures leading to denials of LBE certification to bona fide LBE firms”:*** Every instance of a proposed denial of certification is initially analyzed by the Certification Unit and then presented to the Director for independent analysis. If it is determined by the Director HRC should either not grant certification or de-certify a company, the company is notified, *prior to any action being taken*, and given an opportunity to present its case directly to the Director. If the company is unable to do this, the company is given a cure period to correct the issue. Only after this process is followed does the HRC proceed with the denial of certification to a company.
- ***“Instances of retaliation by department personnel when LBE’s raised questions about contracting decisions”:*** Allegations of retaliation are very serious and should not even be suggested anecdotally without a specific instance being cited – particularly in a document with wide circulation such as the Rosales Report. To do otherwise is irresponsible. Further, there is absolutely no evidence or document to support such an occurrence happening during the Director’s tenure with HRC. If there is a specific charge, it should be immediately brought to the attention of the Department of Human

Resources or the Mayor. HRC does not tolerate retaliation on any issue by anyone, including the Director.

HRC'S RESPONSE TO ROSALES REPORT SECTION ENTITLED "ANALYSIS"

As previously mentioned, the Rosales Reports failed, by its own admission, to conduct a single interview with department heads, including the HRC Director, as to their views about the LBE Program. By choosing to rely heavily on "anecdotal information" rather than actual data and interviews with department heads, including the HRC Director, the Rosales Report raises a number of inaccuracies, if not blatantly defamatory accusations. To state that the Rosales Report does not give a true and complete picture of the current state of HRC's LBE Program is an understatement. It is on this basis that we now seek to address each conclusion made under the Rosales Report's Analysis section.

1. **Rosales Conclusion:** "Notwithstanding noteworthy and economic accomplishments, the LBE Program needs to be better managed by the City so that its promise is met."²

HRC Response: Over the last three years, HRC's number of ASO authorized positions has declined nearly 9%, from 48 authorized FTEs in FY 2008-09 to 41 authorized FTEs for FY 2011-12. During the same period, HRC has reduced its number of funded positions by a similar rate, from 40 funded FTEs in FY 2008-09 to 36 funded FTEs for FY 2011-12. These numbers also do not reflect the numerous compliance staff on extended leave, vacations or out due to illness. In fact, due to budget constraints, HRC has repeatedly been denied the opportunity to backfill a number of positions, including the very important LBE Division Manager position which has been vacant for over a year. The Report itself acknowledges that there is a lack of staff resources for the Post Award Contract Compliance function: "We assume, although have not confirmed, that a paucity of funding and staff resources for the compliance function is what prevents the HRC from correcting any non-compliance earlier in the life of the contract." While a staff reduction by 9%, coupled with continued denials of HRC's requests to backfill even the LBE Manager position could have crippled HRC's ability to manage the LBE Program, it did not. To the contrary, HRC continued performing its charter mandated obligations in a manner consistent with the Administrative Code.

2. **Rosales Conclusion:** "There have been anecdotal reports of African American firms being denied LBE status because they have a secondary office in Oakland with greater square footage than the firm's San Francisco Office."

HRC Response: HRC has not, to date, ever denied certification to a business based solely on the size of its San Francisco Office relative to its other offices. To the contrary, HRC gives weight, as it must do under Section 14B.3 of Chapter 14B and Section VI (A) of

² The Report also states that "...a consensus view among CEE members is that the City, including the Board, has not allocated appropriate funding and staff resources to the implementation and enforcement of the LBE Program."

Chapter 14B Rules and Regulations, to all of the factors surrounding an applicant's primary place of business. In this regard, the Ordinance clearly states that "if a business seeking to be certified has more than one operating location, it must demonstrate that its [San Francisco] office is its principal place of business ...where it provides all of the services for which LBE certification is sought," This is a factual showing based on numerous factors including, but not limited to, the businesses demonstrating that the majority of its principals are based in the San Francisco office, that it pays San Francisco payroll taxes on at least 51% of the total payroll for non-exempt employees; that it operates from an independent office site, has daily functions, fixtures and equipment and sufficient space necessary to operate the business and, that the business location, unless located in a residence, prominently displays the name of the firm. In the case mentioned in the RSLP report, the applicant was denied recertification because it failed to meet virtually every single one of these factors. While the size of applicant's San Francisco office was only one consideration, it was a consideration amongst many others.

In addition, over the last twelve months, the HRC has for the first time conducted an exhaustive audit of firms certified under San Francisco's Local Business Ordinance. This was performed in concert with other local business contracting jurisdictions such as Oakland. It was discovered that many firms had moved out of the City without notifying HRC or withdrawing from the program, were certified by more than one jurisdiction as being headquartered locally based on fraudulent data provided by the company, had far exceeded the allowable annual revenue limits or had formed multiple related businesses to enable them to maintain their local small or micro business status. To protect the integrity of the program, HRC notified the companies of the audit results and asked for data to dispute the conclusion they were no longer eligible for certification. In many cases, the companies did not dispute HRC's conclusion and withdrew voluntarily from the program. In other cases, absent information which disputed the results of the audit, HRC de-certified the companies.

3. **Rosales Conclusion:** "It has been suggested to us that the number of locally certified African American contractors has consequently declined."

HRC Response: 133 African American firms have been certified/recertified by this program between 2009 and March 30, 2012. This number represents 21% of all certified ethnic business categories tracked by HRC during this period. This is greater than firms which self-identified as a member of the Chinese, Hispanic, Japanese, Vietnamese, Iranian, Irish or other specific ethnic backgrounds. It is also more than the number of firms self-identified as women-owned.

4. **Rosales Conclusion:** "Additionally, there have been reports that the HRC certification unit staff and Director have construed Chapter 14B as permitting the agency to combine revenues generated by long standing certified LBE firms conducting unrelated commercial activities, resulting in a disqualification of the firms' LBE certification status."

HRC Response: Pursuant to Section 14B.3 of Chapter 14B, "any business under common ownership, in whole or in part, with any other business meets the requirements of this subparagraph only if the aggregate gross annual receipts of ALL of the businesses under such common ownership do not exceed these limits. " The purpose of this requirement is to prevent otherwise large, non-disadvantaged business owners from dividing their businesses into smaller entities simply to meet the dollar thresholds of the LBE program. If HRC did not aggregate, as it is required to under the ordinance, the total gross receipts of all businesses commonly owned by each owner of an LBE when determining if an LBE meets the dollar thresholds for certification, HRC would violate both the letter and the spirit of the very law it is tasked with enforcing.

5. **Rosales Conclusion:** "The utilization data for fiscal years 2009-10; 2010-2011 suggests that LBE primes have little access to contracts over \$10M in value."

HRC Response: Pursuant to Chapter 14B, the LBE bid discount applies only to contracts under \$10M. In FY 2010/11, LBEs won 93% of construction contracts under \$10M awarded by the four largest construction contract awarding departments (AIR, PUC, DPW, REC). This is the greatest success the program may have every attained in its entire history. In addition, to address the issue of LBE's not being able to access contracts over \$10M, the Board of supervisors created the SBA/LBE Program to give a 2% bid discount to firms too large to be LBE's but too small to compete with the multi-national E&C's.

6. **Rosales Conclusion:** "Based on these data, we believe that some departments are not on their own initiative unbundling large contract opportunities."

HRC Response: The Report makes this statement, yet one of its Short Term Recommendations is to hand over this and many other functions to the Contract Awarding Authorities. Specifically, Short Term Recommendation #3 states:

"Transfer functions and staff related to bid/proposal solicitation and analysis including goal setting, award recommendations, post award and exit verification as to LBE prime and subcontractor participation from the HRC to contract awarding authorities with oversight by the Office of Economic and Workforce Development or City Administrator."

With respect to unbundling contracts, as is described in Chapter 14B, HRC works directly with the Departments to divide projects into smaller parts when it is feasible to do so.

Chapter 14B.7(A) states the following good faith efforts with respect to unbundling contracts:

- (1) Arranging contracts by size and type of work to maximize the opportunities for LBEs to participate. This includes dividing projects into smaller parts.
 - (a) As soon as practical before soliciting Bids, Contract Awarding Authorities shall submit large contract proposals to the Director for review. The Director shall determine whether the proposed contract can be divided into smaller contracts so as to enhance the opportunity for participation by LBEs. For purposes of this paragraph, "large project" means any Public Works/Construction Contract estimated to cost more than \$5,000,000, any Professional Services Contract estimated to cost more than \$100,000, and any Commodities Contract with a term greater than one year, including any options to renew or extend.
 - (b) If the Director determines, after consulting with the Contract Awarding Authority, that the Contract can be divided into smaller contracts, then the Director and the Contract Awarding Authority shall confer regarding all of the costs and benefits of soliciting the Contract as a single contract or dividing it into smaller contracts, including but not limited to the potential for enhanced opportunities for LBE participation as prime contractors, the potential for LBE participation as Subcontractors, relative costs, administrative issues, and any other matters relevant to the accomplishment of the purpose of the subject Contract or Contracts. If, after exchanging information and conferring regarding these issues, the Contract Awarding Authority and the Director are unable to agree on whether to divide the Contract into smaller contracts or how to divide the Contract, the Mayor or the Mayor's designee shall resolve the matter.

The desired goal of unbundling larger contracts is not likely to be achieved by handing over this function (and many others) directly to the departments if the departments themselves are "not on their own initiative unbundling" these contracts.

7. **Rosales Conclusion:** "A Sunshine Ordinance Request disclosed that the HRC Director had granted the Airport's request for a waiver of subcontracting goals purportedly because the entire scope of work was intended to be performed overseas. A closer examination of the proposed contract's scope of work, however, does not support this explanation."

HRC Response: The Airport published/advertised the RFQ before sending it to HRC to review. The standard process is to send RFPs/RFQs to HRC for its review before RFPs/RFQs are published/advertised. Moreover, the waiver request was made prior to the RFQ being published/advertised and, therefore, prior to HRC's review. The March 1, 2012 letter by the Airport justifying the waiver request states, "Given the nature of the highly-specialized services to be provided in overseas locations, we are requesting a

waiver for the Chapter 14B LBE subcontracting goal and requirements for this RFQ." A previous waiver was submitted and approved for the same type of work back in February 2009 by the then Director, Chris Iglesias. HRC attended the pre-bid meeting on April 12, 2012 for this project. Based on numerous inquiries from LBEs regarding LBE participation, HRC urged the Airport to change the RFQ to allow for LBE participation. Based on HRC's recommendation, the Airport issued an addendum to change the minimum requirements in order to make it easier for LBE firms to meet the requirements. The Airport then extended the submission date. After multiple conversations between HRC and Airport staff, the Director sent an email on May 4, 2012 to the Airport outlining various concerns and requesting a postponement to allow for the possibility of an LBE sub-goal. The Airport did not make any such changes.

It is also noteworthy that prior to submission of the Sunshine request, Ms. Rosales, in her professional advocacy of businesses seeking to bid on this project, was aware of ongoing discussions between the Airport and the HRC. If she had expressed her concerns to the Director directly, early in the process, a different outcome could have possibly been attained.

8. **Rosales Conclusion:** "We did not have access to publicly available information which would allow us to evaluate award recommendations."

HRC Response: HRC does not make award recommendations. Pursuant to the City's contracting requirements, HRC evaluates the low bidder's or highest ranked proposer's HRC submittal package for compliance with pre-award Chapter 14B requirements and reports this information via memorandum to the Contract Awarding Department.

9. **Rosales Conclusion:** "The Diversity Tracking System is a critical tool that, when properly deployed, ensures adequate communication to the Mayor, Board, stakeholders and the public about the City's progress towards meeting the legislative goals of Chapter 14B. From the utilization reports we have reviewed, it is clear that not all data on contract awards are being entered, reported and/or disseminated."

HRC Response: Prior to August 2009, the previous Director determined that the current (at that time) Diversity Tracking System was inoperable due to a multitude of issues. He received funding and subsequently retained the services of a consultant to correct the deficiencies in the current system. In late August 2009 the current Director determined a more robust system was necessary and dismissed the consultant. In the spring of 2010, HRC, in collaboration with the Department of Technology, began an analysis of the business and technology needs related to the administration of the 14B ordinance. That analysis culminated in the publication of the DiversitySF Recommendation Report which found that "the Diversity Tracking System fails to meet HRC's business and functional needs." The report also stated that the most attainable solution to HRC's problem is to purchase commercial off the shelf software.

HRC considered two commercial software providers, B2G Now and Elations Systems. HRC created an evaluation matrix and asked both providers to demonstrate their software. A panel made up of representatives from the Airport, DPW, PUC, Controller's Office, DT and HRC scored each software vendor. In 2011, HRC joined an existing contract with the Office of Labor Standards Enforcement to procure software from Elation Systems and Software to track and manage LBE participation. This new software has been in use by HRC to track LBE participation since January 2012. Even with the inoperability of the original Diversity Tracking System and during the time a new system, DiversitySF, was being spec'd and configured, HRC manually prepared quarterly reports and distributed them to the president of the BOS, the LBR AC and posted them on the HRC web site.

10. **Rosales Conclusion:** "Unfortunately, the HRC utilization reports we have reviewed suggest that the Micro LBE Set-Aside element of the LBE Program has not been administered as mandated in Chapter 14B."

HRC Response: Pursuant to Chapter 14B.7(K):

(1) Each fiscal year, each Contract Awarding Authority, in consultation with the Director, shall set aside the following for award to Micro-LBEs:

- (a) Not less than 50% of eligible Public Work/Construction Contracts and
- (b) Not less than 25% of Eligible Services/Commodities Contracts.

(2) Contracts under the Micro-LBE Set-Aside Program shall be competitively awarded in accordance with the Purchaser's regulations, except that if (a) fewer than two qualified Micro-LBEs submit bids, or (b) the Contract Awarding Authority determines that the Contract would not be awarded at a fair market price, then the Contract Awarding Authority may reject all Bids and rebid the contract outside the set-aside program.

HRC works the Contract Awarding Departments in order to identify Micro-LBE Set-Aside opportunities that fall within the above criteria. Since January 2010, there have been 23 Micro-LBE Set-Aside contracts awarded.

11. **Rosales Conclusion:** "The transfer of the contract administration function was due in part to the apparent inability of the HRC management to ensure continuity in funding of the professional services agreement with Merriwether & Williams."

HRC Response: Ms. Rosales' characterization of the reasoning behind transitioning the Surety Bond Program to risk Management is incorrect. The main reason behind the transition is, now that the program has reached a mature state, it is essential that the program be overseen by financial and risk management professionals. Even with a very knowledgeable consultant in Merriwether and Williams, there needs to be corresponding experience in the regulatory agency overseeing the program. In addition,

the continued funding of the "not to exceed" contract with the consultant is due to a reduction in funds by the Budget Analyst in the final stages of the 2010-2011 budget. This was out of the control of HRC. Merriwether and Williams were notified almost immediately and asked to modify their functions accordingly. There was also an erroneous work order from HRC to Risk Management that reduced the available funding for the consultant's contract. That money has since been released and is available for payment to the consultant. There are also outstanding funding issues with the program that need to be considered in the 2012-2013 Risk Management budget.

It should be noted while a handful of LBE's have, over the life of the program, have greatly benefitted from the Surety Bond Program, there remains an important policy issue that needs to be resolved by the City about the ultimate purpose of the program. Currently very few companies have been able to access the funds under the Surety Bond Program and, as such, the cost to the City, per company, has been relatively high. It needs to be determined if the ultimate purpose of this program is to allow a wider participation of firms or to concentrate on assisting a few firms to grow beyond the reach of the program. The program also needs to be more results driven, as opposed to what it is now: function driven. Ms. Merriwether of Merriwether and Williams and HRC are in agreement that this needs to be the stated direction of the program and that all reporting has to be adjusted to show the cost benefit of the program for the City and the LBE's trying to access City contracts.

12. **Rosales Conclusion:** "Because we have not interviewed City department heads, we are unable to comment as to whether LBEs are receiving prompt payment for their services from the City or City prime contractors."

HRC Response: In meetings with LBE's over the last year, HRC has determined that even with the 14B amendments of 2010 addressing the issue of prompt payment, there is still an ongoing problem with regard to this issue. We have found that particularly second and third tier sub-contractors are vulnerable to slow payment by primes, both majority and LBE. There always appears to be a reason why they are not being paid promptly. We have investigated numerous complaints and have been marginally successful through this intervention. As a result of these experiences, the Director has met with Webcor, and had discussions with other large contractors, to solicit their thoughts on how to address this issue. Webcor, specifically, has submitted their suggestions in writing. To date, however, HRC has not had staff available to pursue these recommendations beyond this initial stage.

HRC'S RESPONSE TO ROSALES REPORT SECTION ENTITLED "CONCLUSION"

The current configuration of LBE Ordinance certainly does not allow the original intent of the program – to promote and increase public contracting opportunities for minorities and women - to prosper. The LBE advocacy program institutionalized by Administrative Code 14B is, by design, race and sex neutral. Although, the HRC tracks minority and women-owned business

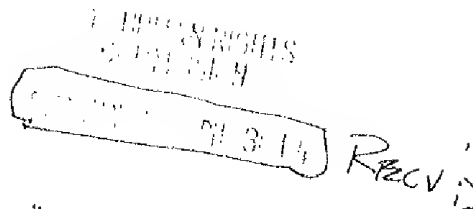
certifications and contracting, it cannot legally advocate specifically for these groups. We have been successful in our efforts to promote local businesses as evidenced by the extremely high contract award data on all public works construction contracts under \$10M in 2011. In addition, by utilizing the non-discrimination ordinances administered by HRC, Administrative Code 12B and Police Code 33, we have been successful in demonstrating that individuals and companies from under-performing neighborhoods should be targeted through outreach and contract pre-qualifications. A recent example of using this method of combining the implications of discrimination under 12B with the contracting options in 14B and Chapter 6, is the Bayview Library project. So far, utilization of local, minority, small companies and local residents has been extremely high. But, until Prop 209, and ultimately our LBE ordinances are able to enforce contracting enhancements for minority and women, it will be extremely difficult under current law to achieve the success envisioned when the original MWBE ordinance was proposed.

We agree with many of the suggestions Ms. Rosales stated in her conclusion about ways to enhance minority and women-owned business participation in public contracting. We do not, however, agree that the oversight functions currently residing at HRC and codified in 14B should be transferred to the contracting agencies. Although all of the agencies with which we've worked over the last few years have good intentions to increase minority and women-owned businesses, most notably at the highest levels of the agencies, sometimes priority conflicts arise for the project managers and engineers directly managing individual projects. It is because of these conflicts and inconsistent interpretations of the ordinance from agency to agency that it is crucial the contract compliance function continue to reside in an independent department. Further, the combination of all the various contract compliance function into one single contract compliance department makes the ultimate sense. It can make the function more fiscally responsible, efficient and business friendly, all items at the top of this Mayor's agenda.

* * * * *

APPENDIX A:

“Assessment of the City and County of San Francisco’s Performance under SF Administrative Code Chapter 14B” by Rosales Business Partners LLC dated May 14, 2012



May 14, 2012

Mara E. Rosales
mar@rosalesbusiness.com

Mayor Ed Lee
City and County San Francisco
City Hall, Room 200
1 Carlton Goodlett Place
San Francisco, CA 94102

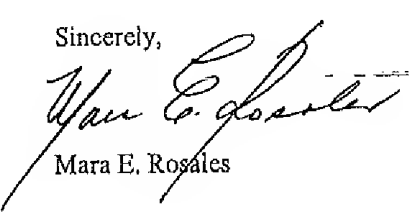
Re: Assessment of the City and County of San Francisco's Performance under SF
Administrative Code Chapter 14B

Dear Mayor Lee:

Enclosed please find our report entitled "Assessment of City and County of San Francisco's Performance under SF Administrative Code Chapter 14B". We are available at your convenience to discuss any matter raised in the report.

I may be reached at (415) 986-0523.

Sincerely,


Mara E. Rosales

MER:rg

cc: Naomi Kelly, City Administrator

**ASSESSMENT OF THE CITY AND COUNTY OF
SAN FRANCISCO'S PERFORMANCE UNDER
SF ADMINISTRATIVE CODE CHAPTER 14B
(Local Business Enterprise Program)**

INTRODUCTION

Rosales Business Partners LLC (RBP) was retained by the City and County of San Francisco (City) to provide a report regarding the performance of its Local Business Program, codified as San Francisco Administrative Code Chapter 14B (Chapter 14B or LBE Program). Specifically, RBP has been tasked with the following:

Using publically available information, consultant shall conduct a comprehensive organizational analysis of the City's administration of its non-discrimination in public contracting programs set forth in the Local Business Enterprise and Non-discrimination in Contracting Ordinance, SF Admin Code Chapter 14B and make recommendations to ensure that the City operates its programs fairly, effectively and efficiently to enhance contracting opportunities for local business enterprises.

Without limitation of the foregoing, Consultant shall study each of the following specific functions performed now by the Human Rights Commission (HRC) and make specific recommendations as to whether the function is consistent with the HRC's advocacy mandate, and whether the function would be in the best interest of the City and stakeholders from a program and budgetary perspective if transferred to a contract compliance unit elsewhere in City government that would be independent of the HRC:

- (1) LBE Certification Program;
- (2) 14B functions related to bid responsiveness (including outreach and building LBE capacity), award recommendation, and all post-award contract compliance;
- (3) Diversity Tracking System administration and support;
- (4) Micro LBE set-asides;
- (5) Surety Bonding and Construction Loan Program; and
- (6) LBE Prompt Payment oversight.

At the outset, we make two important observations. First, given the limited timeframe to provide our opinion and recommendations, RBP focused on information from publically available sources pertaining to the LBE Program functions during the past 3 years. We have also not conducted interviews with department heads, including the HRC Director, as to their views about the LBE Program. Second, the anecdotal information contained in this report was provided voluntarily by members of the local business community to assist RBP present the City with stakeholder input and recommendations.

EXECUTIVE SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

The LBE Program began in 1984 as part of the City's precedent-setting "Minority/Women/Local Business Utilization Ordinance". Today it is a complex regulatory scheme which aims to maximize opportunities for small San Francisco based business, both minority and majority owned. Notwithstanding noteworthy and economic accomplishments, the LBE Program needs to be better managed by the City so that its promise is met. For reasons stated more specifically in this report, at pages 2 to 13, RBP recommends that the LBE certification program function, and oversight of the LBE Program's implementation by contract awarding departments be transferred from HRC to a high executive office such as the Office of Economic and Workforce Development or the Office of the City Administrator. Additionally, RBP recommends that day-to-day implementation of the LBE Program elements, including subcontractor goal setting, set-asides, application of bid discounts, outreach and contract compliance be transferred to contract awarding departments, with oversight by the Office of Economic and Workforce Development or the Office of City Administrator.

RBP also recommends that: (1) the Human Rights Commission retain its advocacy role for minority and women businesses; and (2) the City embark on a new local business policy centered on achieving economic equity for San Francisco's small local businesses, minority and majority owned. Our conclusions and recommendations are set forth in greater detail at pages 12 to 14 of this report.

RELEVANT BACKGROUND

We first provide a brief background on the history of the LBE Program. In April, 1984, the Board of Supervisors adopted ordinance no. 139-84, entitled "The Minority/Women/Local Business Utilization Ordinance (the Ordinance) and known as San Francisco Administrative Code, Chapter 12D¹. The goals of the Ordinance with regards to minority/women business enterprises are well presented in the Final Report of the San Francisco Independent Task Force on Affirmative Action in Public Contracting issued in September 2000 (Final Report), and need not be repeated here. The questions before us pertain to the local or race-neutral business participation program.

The Ordinance established the City's policy in favor of supporting local business enterprises (irrespective of size) wishing to do business with the City and provided a five percent (5%) bidding/rating preference for prime contractors that were certified local business enterprises. The key legislative finding of the Ordinance justifying the 5% bid/rating preference for LBEs was:

¹ All code sections are to the San Francisco Administrative Code, unless otherwise listed.

That local businesses which seek to enter into contracts with the City and County of San Francisco are at a competitive disadvantage with businesses from other areas because of the higher administrative costs of doing business in the City (e.g. higher taxes, higher rents, higher wages and benefits for labor, higher insurance rates, etc.)

Although the 5% bid/rating preference was a modest compensatory initiative, it nonetheless drew a legal challenge but was ultimately upheld. (See, *Associated General Contractors of California v. City & County of San Francisco* (9th Cir. 1987) 813 F.2d 922, 942-3.)

In 1989, the Ordinance was substantially amended in response to the United States Supreme Court's decision in *City of Richmond v. Croson* (1989) 488 U.S. 469, resulting in ordinance no. 175-89, (Ordinance II). The major amendment provided that only San Francisco small businesses were beneficiaries of the LBE (and M/WBE) provisions. (See generally, *Associated General Contractors v. Coalition for Economic Equity* (9th Cir. 1991) 950F.2d 1401-15.)

Approximately a decade after the City adopted Ordinance II, under the direction of then Mayor Willie L. Brown, Jr., it commissioned the Final Report cited above. Of note, the task force made the following recommendations:

- Transfer the M/W/LBE certification program from the HRC to a new unit, the Office of Contract Oversight, within the Controller's Office.
- Transfer functions related to bid analysis, award recommendation, and all post-award contract compliance functions pursuant to Chapter 12D to a new unit, Division of Contract Audits and Monitoring – to be administered by the Controller's Office.
- Transfer the administration and support responsibility for the Diversity Tracking System to the newly proposed Controller's Office of Contract Oversight.
- Continue HRC's advocacy role on behalf of M/WBEs in City contracting.
- Establish penalties for retaliation against M/WBEs by City officials.
- Establish a Subcontracting Goals Committee to set goals on large contracts and to resolve disputes between HRC and awarding departments.
- Create a Goal Setting Unit within the HRC.
- Focus HRC activities on centralizing, enhancing, and strengthening Citywide Support Services.
- Centralize and expand funding for the City's bonding, financing, insurance, and outreach efforts within the HRC.
- Establish an Office of M/WBE Professional Assistance within the HRC.
- Coordinate closely with the Mayor's Offices of Economic Development and Small Business Affairs.
- Develop roles and responsibilities for the HRC staff to successfully perform these new functions.
- Implement an Ombudsman position within the HRC.

- Increase funding for the Human Rights Commission.

It appears that the City adopted few, if any, of the Final Report's recommendations. Significantly, notwithstanding a year's effort leading to the Final Report recommendations all Ordinance II's functions remained with the HRC. A major shift occurred four years after the issuance of the Final Report in 2004 – when the City enacted Chapter 14B. The Ordinance II's remedial affirmative action provisions were essentially converted to race/gender neutral language, after a trial court ruling that the race/gender based provisions were inconsistent with Proposition 209, also known as the Civil Rights Initiative. (See, *Coral Construction Co. v. City & County of San Francisco* (2010) 50 Cal. 4th 315.)

The central purpose of Chapter 14B is clearly stated by the Board of Supervisors (Board): for the City to provide assistance to small local businesses. Specifically, Section 14B.1.provides in relevant part:

The City shall assist small and micro local businesses to increase their ability to compete effectively for the award of City contracts. The Mayor shall establish Citywide goals for participation by small and micro local businesses in contracting. The City shall provide the bid discounts, set asides, and subcontracting opportunities set forth in this Ordinance, information and training, and other assistance to small and micro local businesses in order to reach these goals. The Human Rights Commission and Director shall assist other City departments to implement the goal of increasing participation in City contracts by small and micro local businesses.

The essential “access to contract opportunity” tools for LBEs set forth in Chapter 14B are:

- Bid discounts for contracts subject to competitive bidding e.g. public works
- Rating preferences for professional services contracts
- Unbundling of large contract opportunities into smaller opportunities
- Mandatory Micro LBE set-asides of select prime contracts
- Subcontracting goals for LBE subcontractors
- Outreach
- Training
- Certification

In mid-2009, then Mayor Gavin Newsom and the HRC appointed a new Director, which prompted a strongly worded letter of protest from the Coalition for Economic Equity (CEE)². In

² The CEE is a coalition of ethnic trade organizations organized in 1982 to address low M/WBE participation in City contracts.

a July 2009 letter from the CEE to the Mayor, the CEE openly voices concern and alarm at the appointment of a new Director who "reportedly 'feels the [HRC] agency has been too focused on contracting oversight.'" The CEE states in relevant part: "Should this [HRC Directorship change] come to pass, it would evince a total disregard for the [local] minority-and women-owned business community, for the continuing problem of discrimination and exclusion in City contracting, and for the critical role that HRC plays in righting this wrong."

METHODOLOGY

Given the breadth of the scope of services and the narrow time window within which to provide an analysis and report, we made a diligent effort to obtain relevant information in the public domain. Consequently, we have reviewed the following:

- The Final Report, September 2000
- Chapter 14B LBE Utilization Report for Fiscal Years 2009-10; 2010-11
- Controller Audit Reports, dated July, 2010 and September, 2011
- City and County Budget Reports
- San Francisco Administrative Code
- Pending Requests for Proposals or Qualifications³

SUMMARY OF CONTROLLER AUDIT REPORTS

The Office of the San Francisco Controller - City Services Auditor (Auditor) released two audits on the LBE Program, one on July 28, 2010, and a second on September 29, 2011. We summarize these audit reports because they provide an objective analysis on the recent performance of the LBE Program and are relevant to the questions posed by the City.

In July 2010, the Auditor found that LBE contract compliance was generally good, with all but one contractor surveyed meeting the LBE goals, and that one was properly waived. However, some documentation requirements were noted as incomplete; the Airport did not collect Progress Payment forms, DPW did not require a Contract Modification form, the Port did not require a Payment Affidavit form, and there were some instances of missing subcontractor invoices. There was one minor finding directed to the HRC regarding updates to the Procedures Manual as a result of updates to Chapter 14B.

Each department responded to the July 2010 audit findings. All other departments concurred with the auditor's findings, with the following exceptions.

³ Because RBP is a certified LBE in several professional services categories, we regularly receive notices of RFP/Q solicitations for the award of professional services by various City departments. Through RBP's business network we know of requests for bids as well. In light of our engagement with the City, we closely examined the manner in which these various solicitations were being conducted, so that we could report our views on the "active" solicitation of LBE interest in City contracts.

The HRC noted that LBE subcontractors were properly paid regardless of the status of Progress Payment form collection for the Port, Airport projects, and LBE requirements were satisfied. DPW noted that it would prefer to streamline the process of invoice collection by requiring only the prime to submit subcontractor invoices; HRC agreed. The HRC acknowledged the discrepancy between the code and the Procedures Manual but noted that the upcoming implementation of the DiversitySF technology portal would address the auditor's finding.

In September 2011, the Auditor found increased nonconformity with Chapter 14B. None of the audited contractors fully complied: HRC failed to disqualify an LBE subcontractor due to relocation, and two LBE subcontractors contracted their work in turn to non-LBE subcontractors for Airport and SFPUC projects, which was missed by compliance officials since no site visits were performed. Also, HRC forms were found missing or inaccurate for Airport, SFPUC, and DPW contracts. The Auditor further found that the Airport did not update all information in the Diversity Tracking system, and that the HRC Procedures Manual was unclear on guidance for department construction contract compliance site visits.

Each department responded to the September 2011 audit findings. The HRC noted that the Commission was working diligently to respond to the Auditor's findings from the previous year despite staff reductions, and will continue to improve the Procedures Manual. All departments concurred with the Auditor's findings, with the following exceptions.

DPW noted that it would prefer to streamline the process of invoice collection by requiring only the prime to submit subcontractor invoices; HRC agreed. The Airport disagreed with the auditor's finding regarding the Diversity Tracking system and noted that all information was input consistently until the transfer of a key employee just before the audit.

It is noted that HRC's audit response from 2010 relying on the DiversitySF system to drive compliance may not have been implemented, as there was no evidence in 2011 of creation or use of the DiversitySF system as separate from the Diversity Tracking System. HRC notes in 2011 that it is implementing the 'Elation Systems' system; it is unclear if this is considered the same as DiversitySF by HRC.

In short, the major findings by the City Services Auditor were related to incomplete recordkeeping and follow-up, but are not seen as evidence of a systemic issue or abuse of discretion.

COMMUNITY CONCERNS

In preparing this report, RBP also considered the views of CEE, the primary stakeholder organization advocating for the Ordinance and its successor programs. RBP has participated in ongoing community meetings with members of the CEE since the start of 2012. Numerous concerns have been raised by CEE members regarding the City's implementation of the LBE program. Initially, CEE members voiced a general sentiment that the smaller, historically

underutilized firms, were not being utilized in City contracts and were being left behind. CEE members could not verify these concerns because the HRC had not posted regular, detailed utilization reports on LBE participation in City contracts as required by Chapter 14B. A Sunshine Ordinance request to the HRC Director, submitted by CEE on February 8, 2012, triggered the disclosure of *some* of this valuable information but it was not in a form which allows for an objective or well informed assessment of the LBE Program's performance.

Other concerns referred to errors in ordinance interpretation by HRC staff regarding joint venture arrangements, poor handling of the Surety Bonding program contract by the HRC Director, a slow processing of complaints of discrimination, a lack of a proper protest procedure for errors in a competitive process, incorrect analysis of certification requirements leading to denials of LBE certification to bona fide LBE firms, and instances of retaliation by department personnel when LBEs raised questions about contracting decisions. Basically, a segment of the San Francisco business community believes that some members of the HRC Commission and the HRC Director do not understand or embrace the purpose of the LBE Program and thus are not appropriately enforcing its requirements. As a consequence of this "neglect", stakeholders have witnessed some City department decisions which, in their view, do not advance the Board's clear vision in Chapter 14B: to assist small local businesses access and perform an equitable portion of the City's lucrative business portfolio. Moreover, a consensus view among CEE members is that the City, including the Board, has not allocated appropriate funding and staff resources to the implementation and enforcement of the LBE Program.

ANALYSIS

We start by addressing the City's progress towards each of the LBE Program's major components.

LBE Certification Program

The information available to us through public records reflects that in the past three years, there has been a significant increase in the certification and re-certification of LBEs, the majority of whom are M/WBEs. The number of LBEs denied certification or re-certification or disqualified or suspended is 66, a small percentage (4.5%) of all firms seeking certification during said three year period. This would appear to be very good news. There have been anecdotal reports of African American firms being denied LBE status because they have a secondary office in Oakland with greater square footage than the firm's San Francisco office. It has been suggested to us that the number of locally certified African American contractors has consequently declined. Additionally, there have been reports that the HRC certification unit staff and Director have construed Chapter 14B as permitting the agency to combine revenues generated by long standing certified LBE firms conducting unrelated commercial activities, resulting in a disqualification of the firms' LBE certification status. We have not verified these accounts and

recommend that the City investigate these allegations.

Pre-Award Functions

Departments have many duties under the LBE Program, the first of which is to arrange "contracts by size and type of work to maximize the opportunities for LBEs to participate. This includes dividing projects into smaller parts." (Sec. 14B.7.(A).) Other departmental duties are (1) encouraging LBEs to attend pre-bid meetings where information about contracting opportunities is presented; and (2) providing notice to LBEs certified to perform the work contemplated in a contract opportunity, soliciting their interest in the contract, among others. A general review of recent solicitations indicates that City departments are for the most part in sync with the outreach requirements of the LBE Program. Without having interviewed the HRC Director, it is difficult to assess whether City departments are taking the extra steps to unbundle very large contracts into smaller contracts to facilitate the participation of prime LBEs. The utilization data for fiscal years 2009-10; 2010-11 suggests that LBE primes have little access to contracts over \$10M in value. Based on these data, we believe that some departments are not on their own initiative unbundling large contract opportunities.

Departments do appear to communicate well the requirements of the LBE Program concerning the award of prime contracts e.g. the availability of the bid discount/rating preference. When it comes to the *application* of the bid preference or rating preferences, however, there may be a practice by HRC staff to deviate from the letter and intent of Chapter 14B. We are aware of at least one instance where the analysis of a request for LBE joint venture preference points, as applied to a joint venture proposer in a DPW material testing and special inspection contract opportunity, was at odds with Chapter 14B. Essentially, under Section 14B.7(F) the department must apply the joint venture rating preference to architect/engineering contracts (1) that meet the requirements of the ordinance; and (2) when the LBE partner is active in the venture, performs and manages the work, takes financial risks and enjoys profits proportionate to the LBE's "level of participation stated in the bid documents..." In the DPW matter referenced above, a joint venture between a Micro-LBE and a non LBE was denied preference points because HRC staff interpreted HRC regulations and contract attachments as permitting it to impose *additional* licensing requirements on joint venture associations beyond those required by DPW or set forth in the LBE ordinance.

In light of this instance, we propose that the City Attorney's Office review the HRC Regulations and HRC Contract Attachments to ensure their consistency with Chapter 14B.

Pursuant to the LBE Program, departments are also to collaborate with the HRC staff in establishing subcontracting participation goals. Subcontracting goals are to be set (1) to the extent of subcontracting opportunities presented by the contract; and (2) the "availability of Small and Micro-LBE subcontractors certified to provide the goods and services required under the scope of the proposed Contract." (Sec. 14B.8.(A).) Waivers of the subcontracting goals may

be requested by a department and granted by the HRC Director where the department "anticipates that there are no subcontracting opportunities or there are not sufficient LBEs available to perform the subcontracting work available on the Contract." The administration of the subcontractor element of the LBE Program as it applies to RFP/B opportunities, on the whole, appears to be implemented consistently and according to Chapter 14B. One notable exception that came to our attention was the RFP for International Strategic Marketing Services issued by SFO. There, the RFP (which is still pending) was published with no LBE subcontractor goals. A notice of the RFP was issued to certified LBEs that might have qualified had there been subcontracting goals, creating some degree of confusion among the LBEs that were interested in the opportunity but could only compete as subcontractors. A Sunshine Ordinance Request disclosed that the HRC Director had granted the Airport's request for a waiver of subcontracting goals purportedly because the entire scope of work was intended to be performed overseas. A closer examination of the proposed contract's scope of work, however, does not support this explanation. When some of the LBEs raised concerns to the HRC that LBE participation was excluded on the contract with no subcontracting goals and with minimum qualifications requirements LBEs could not satisfy, the Airport issued an addendum modifying the minimum qualifications to allow for more participation by potential prime competitors. Clearly, the LBE Program is not intended to work in this fashion.

We propose that the City Attorney's Office review the RFP, the waiver request, the reason for the HRC Director's grant of the waiver request in light of Chapter 14B's requirements and provide advice to the Airport on how to proceed with this solicitation to ensure that available LBEs have an equitable opportunity to participate on this contract.

Waivers

Mandatory waivers of prime LBE contract requirements are allowed under Chapter 14B but only under limited circumstances e.g. in cases of an emergency or where the goods or services are procured from a sole source. (Sec. 14B.7.(J).) As mentioned above, a waiver of LBE subcontractor goals is also permitted—again on narrow grounds e.g. no anticipated subcontracting opportunities or there are not sufficient LBEs available to perform the subcontracted work. (Sec. 14B.8.(A).) In each case, the HRC Director has the authority to grant the waivers. The HRC Quarterly FY Reports for 2011 indicates that 150 requests for waiver of 14B requirements were received, 137 waivers granted amounting to \$120,000,000 in contract dollars. We were unable to glean from the public records accurate numbers for FY 2009 and FY 2010 and further information is needed in order to analyze HRC waiver statistics.

LBE Goal Setting

We note that the LBE goal setting methodology used by HRC staff is akin to the methodology previously applicable to the setting of race/gender based goals. In other words, the race-neutral goals are being set as though they are race/gender based goals. This approach is unnecessarily

restrictive and hinders rather than advances the Board's vision of increasing the ability of LBEs "to compete effectively for the award of City contracts". (Section 14B.1.(C)(1).) Consequently, the current method of setting LBE subcontractor goals should be revisited, with the aim of exploring alternative measures which are more effective in building LBE capacity to perform City contract services.

Award Recommendations

We did not have access to publicly available information which would allow us to evaluate award recommendations.

Post Award Contract Compliance

Post award contract monitoring and compliance are as important to the success of any local small business utilization program as pre award activities. In a perfect world each contract with LBE participation would have staff oversight so that any changes during the performance of the contract scope can be attended to as soon as revisions occur. Naturally, such a system would demand considerable resources, particularly if the oversight is vested in an entity outside of the procuring agency. The LBE Program assigns the post award contract compliance function to the HRC. Section 14B.17 requires that the HRC Director "monitor the City's utilization of Small-MBEs, Micro-LBEs, MBEs, WBEs and OBEs in City contracting. The Director [must] issue an exit report for any contract that includes LBE subcontracting participation and/or LBE prime contract participation as a joint venture partner. The purpose of this exit report is to ensure that prime contractors are complying with their commitments to use LBE subcontractors and LBEs are performing services as set forth in the bid/proposal and contract documents for the joint ventures." Given that waivers of LBE requirements are limited, the practical import of the ordinance's post award monitoring mandate is that virtually every contract awarded by the City is subject to at least an exit report and analysis. We understand that through the exit report process HRC staff is regularly able to identify a lack of compliance by City contractors with LBE provisions. We assume, although have not confirmed, that a paucity of funding and staff resources for the compliance function is what prevents the HRC from correcting any non-compliance earlier in the life of the contract.

Diversity Tracking System

The Diversity Tracking System is a critical tool that, when properly deployed, ensures adequate communication to the Mayor, Board, stakeholders and the public about the City's progress towards meeting the legislative goals of Chapter 14B. A proper implementation of the Diversity Tracking System requires a collaboration and cooperation between and among the HRC, City awarding authorities and the Controller. From the utilization reports we have reviewed, it is clear that not all data on contract awards are being entered, reported and/or disseminated. Because we have not interviewed the HRC Director we do not know what is the root cause of

this issue. Nevertheless, it is paramount that the City assign the appropriate staff resources to get this job done. As mentioned above, a consensus among CEE members is that very small local minority/women owned business firms do not have an equitable share of the City's business. The view may stem directly from the City's failure to disclose detailed contract utilization information that should be produced by the Diversity Tracking System.

Micro LBE Set-Asides

Pursuant to Section 14B.7.(K), on an annual basis each contract awarding authority, in consultation with the HRC Director, is *required* to set aside at least half (50%) of "eligible public work/construction contracts" and at least a quarter (25%) of "eligible services/commodities contracts". The policy underlying these requirements is to enhance opportunities for smaller LBEs, such as new or emerging or historically underutilized firms, thereby supporting their growth and competitiveness as prime contractors. (See Sec. 14B.1.(B).) Unfortunately, the HRC utilization reports we have reviewed suggest that the Micro LBE Set-Aside element of the LBE Program has not been administered as mandated in Chapter 14B.

Surety Bond & Construction Loan Program

Currently, the Surety Bonding and Construction Loan Program contract is being transitioned into the Risk Manager's office. The transfer of the contract administration function was due in part to the apparent inability of the HRC management to ensure continuity in funding of the professional services agreement with Merriwether & Williams. There are some outstanding budget and funding issues which resulted from additional bank fees charged due in part to a delay in securing the program line of credit, which will soon need to be addressed. There also seems to be an upcoming sun-setting of the program in 2013 which will need to be addressed legislatively along with a few other clean-up items.

From the documents we have reviewed from the public record, it appears that the program has been very successful but there is room for enhancements and additional resource availability to further benefit the LBE contractor community, which should be thoroughly explored in the immediate future.

LBE Prompt Payment Oversight

In the Final Report, at page 29, the issue of prompt payment to prime and subcontractors was addressed. In short, the Final Report recommended "that the City explore new ways to assure prompt payment...as this issue is of paramount importance to developing businesses." We agree with this observation. Because we have not interviewed City department heads, we are unable to comment as to whether LBEs are receiving prompt payment for their services from the City or City prime contractors.

CONCLUSIONS

Over the past almost three decades, the City policymakers have demonstrated a commendable commitment to the inclusion and advancement of local and small businesses in City contracting, both as prime and subcontractors. The effort, which was prompted by the CEE and began City-wide in 1984 with a modest 5% bid/rating LBE preference for most prime contract competitions, has developed and expanded into a complex regulatory scheme. As envisioned by the Board-- in partnership with the local chambers of commerce and ethnic trade organizations-- LBEs today have significant legislative tools to access economic opportunity presented through doing business with the City. The public record amply supports the widely held belief among stakeholders that the Board and Mayor Ed Lee are passionate about ensuring that San Francisco small firms, minority and majority, enjoy economic equity. Contract awarding authorities, alone or in conjunction with the HRC, have dedicated significant effort and resources to creating a far more inclusive contracting environment than what existed in 1984.

Notwithstanding noteworthy legislative accomplishments and economic progress, the LBE Program is not the success story it should be after almost 30 years of practice. The frank reality, as reflected in this report, is that the LBE Program needs to be better managed by the City. In RBP's opinion, it is time to embark on the next chapter in the City's procurement history.

We propose that the City adopt a local business enterprise policy centered on economic equity for San Francisco's small local businesses, minority and majority owned. This new policy would recognize: (1) the value of fostering business partnerships between the City and LBEs at every level of City contracting; and (2) the need for the City to promote entrepreneurship by dedicating a portion of its financial resources to building LBE capacity through the contract award process. The new policy's focus would be to facilitate the growth of LBEs by providing LBEs direct access to contract services required by the City, particularly those provided by the majority of the City's vendors and contractors -- who are not San Francisco based or certified LBEs. As Chapter 14B recognizes, small business "are a significant sector of the local economy and form the backbone of our neighborhoods ..." Enacting well-tailored initiatives that stimulate expansion of small firms or development of new enterprises fosters economic growth for the City and County of San Francisco and its residents. The expansion of local small businesses advances the public interest, contributes to the economic well-being of all San Franciscans and tends to minimize the burden on the General Fund to provide for the general welfare.

In order to make a true difference, the new policy would need to give birth to a more simplified way of doing business than the current business model. Equally important, the day- to -day management of the LBE Program would need to be administered by the City's departmental managers -- the experts in procurement of goods and services the City needs. After decades of training and experience with LBE (and M/WBE) programs, policies and contract conditions, the departments are well equipped and capable of taking the daily administration reins of a new LBE policy -- provided that the Board's and Mayor's instructions to the managers are clearly stated.

To be sure, not all LBE Program functions should be managed by contract awarding authorities. Similar to the recommendations in the Final Report regarding the M/WBE programs, RBP believes that policy compliance (including goal-setting), certification, diversity tracking system, and surety bond program duties currently housed in the HRC need to be relocated and assigned to a high level executive office, such as the Mayor's Office of Economic and Workforce Development or the Office of the City Administrator. The Human Rights Commission should retain its advocacy role for the advancement of civil rights for minority and women contractors. The Commission is likely the best administrative forum for appeals of denials of LBE certification applications as well as for the adjudication of discrimination complaints.

RECOMMENDATIONS

SHORT TERM (next 3 months)

1. Continue the Human Rights Commission's advocacy role on behalf of minority and women owned businesses.
2. Transfer the LBE certification program function and staff from the HRC to a new unit within the Office of Economic and Workforce Development or the Office of the City Administrator.
3. Transfer functions and staff related to bid/proposal solicitation and analysis including goal setting, award recommendations, post award and exit verification as to LBE prime and subcontractor participation from the HRC to contract awarding authorities with oversight by the Office of Economic and Workforce Development or City Administrator.
4. Transfer the administrative and support responsibility for the Diversity Tracking System to the Office of Economic and Workforce Development or City Administrator.
5. Transfer oversight duty of contract awarding authority implementation of LBE Program to the Office of Economic and Workforce Development or City Administrator.
6. Centralize and expand funding for the City's bonding, financing, insurance, and related outreach efforts within the Risk Manager/Office of the City Administrator.
7. Implement a LBE Liaison Officer within the Office of Economic and Workforce Development or Office of the City Administrator as the primary interface between that oversight office and contract awarding authorities regarding the LBE Program.

8. Ensure that Chapter 14B implementing rules and regulations and contract guidance/documents are consistent with the provisions of Chapter 14B.
9. Provide training to contract awarding authorities on how to properly perform new duties and responsibilities under transferred LBE Program.
10. Provide full funding for 14B mandates concerning contractor outreach, certification, training, assistance, and information dissemination.
11. Provide full funding for oversight and enforcement functions.
12. Review all denials within the last three years of certification applications (including graduated firms) for LBE certification or renewal of certification for accuracy and fairness.
13. Review waivers of LBE provisions granted as to pending RFP/Q/Bs for compliance with Chapter 14B.
14. Continue the Human Rights Commission's adjudicatory role in hearing appeals of denials of certification applications and complaints of discrimination, except utilize Administrative Law Judges to assist HRC in the fact finding function.

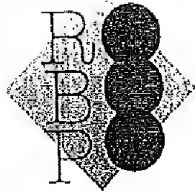
LONG TERM (3-6 months, legislation required)

Simplify/Revise Chapter 14B to:

- Allow contract awarding authorities to effectively and efficiently implement LBE provisions at both prime and subcontractor levels.
- Allow LBEs, in particular Micro-LBEs, to more readily access City contract opportunities and build their capacity to compete for City prime contracts, with a new focus on contracts beyond \$10M in value.
- Leverage new technological solutions or products to streamline LBE Program functions and requirements e.g. certification, utilization tracking, reports, outreach, business to business opportunities.
- Establish mandatory appeal procedures before the HRC (directly and not through the HRC Director) for denials of certification of LBE status and complaints of discrimination in contracting practices.

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FIRM AND TEAM MEMBER BACKGROUNDS



Rosales Business Partners LLC

Rosales Business Partners LLC (RBP) is a San Francisco based and Latino owned firm which specializes in innovative public-private business partnerships. The firm was founded in 2010 by members of the Rosales family--attorneys Mara Rosales and Jim Quadra-- who have dedicated virtually their entire careers to serving government clients and handling public sector issues. Ms. Rosales and Mr. Quadra launched RBP primarily to assist public entities advance their public service mission in partnership with creative minds, strategies, products and solutions offered by the private sector. RBP leverages its extensive public sector know-how to assist public agency clients creatively address operational challenges and new opportunities. With our team of experts, RBP also offers clients innovative technology solutions; including those which can assist local governments manage their assets to maximize revenues for public purposes.

RBP partners and consultants have over 50 years of combined experience providing "Government to Business (G2B)" management services to public agencies on a wide range of matters, including "Government to small business (G2b)" economic development consulting services such as assistance with the creation and implementation of small and disadvantaged business participation policies and programs affecting public contracting.



Mara E. Rosales
Managing Partner

Mara Rosales is a founder and the managing partner of Rosales Business Partners LLC (RBP) and Rosales law Partners LLP. She has dedicated her career to serving public sector clients, including in the airport and transportation industries, as a consultant and an attorney. Ms. Rosales' government career began with the City and County of San Francisco, where she was the principal attorney for the Human Rights Commission and legislative counsel to the Board of Supervisors on the City's Minority/Women/Local Business Utilization Ordinances (1983-1992). Later, Ms. Rosales was a SFO senior staff member for over 11 years, holding high level positions as General Counsel (1992-2003) and Airport Deputy Director for Legislative & Regulatory Affairs (2003).

Ms. Rosales continues to represent public and private clients throughout the country concerning local small and disadvantaged business program and policy issues. She has over two decades of experience assisting institutional clients with "big picture" strategic and creative thinking and the development of oftentimes cutting edge policy initiatives, such as effective community outreach and engagement projects aimed at maximizing local/minority business participation in multi-million dollar construction and concession contracts.

Ms. Rosales is also privileged to be the recipient of several awards in recognition of her efforts in the affirmative action in public contracting area. These include:

- San Francisco Hispanic Chamber of Commerce in 2009 for the "Business Leader of the Year" award
- San Francisco Commission on the Status of Women in 2000 for the "Women who Made a Difference" award
- State Bar of California, honorable mention in 1992 for the "Public Lawyer of the Year" award
- Minority Contractors Association of Northern California in 1985 for the "Outstanding Legal Work" award

APPENDIX B:

Rosales Sunshine Ordinance Request for FY09-10 and 10-11 Contract Award Data for Construction, Architect-Engineering, Construction Management and Consulting Contracts



COALITION FOR ECONOMIC EQUITY

818 - 47th Avenue • San Francisco, CA 94121

Phone: (415) 752-4506 • FAX: (415) 752-4509

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Bernida Reagan

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Mara E. Rosales

Secretary-Treasurer
Samuel Kwong

Legal Counsel
Oren M. Sellstrom

IMMEDIATE DISCLOSURE REQUEST

February 8, 2012

Theresa Sparks
Executive Director
Human Rights Commission
25 Van Ness Avenue, Suite 800
San Francisco, CA 94102-6033

Re: Sunshine Ordinance Request for FYY '09 - 10 and '10 - 11 contract award data for construction, architect – engineering, construction management and consulting contracts

Dear Director Sparks:

I write on behalf of the Coalition for Economic Equity. This letter is a request for immediate disclosure of raw data and reports generated by or received by the HRC from City departments. The Coalition is a non-profit organization, and the documents requested will be used to educate the Coalition and its affiliates about the participation of MBEs/WBEs in City contracting. It will not be used for any commercial purposes.

We request to inspect and copy documents, such as data reports, pertaining to:

1. Construction contracts awarded during fiscal years 2009-2010 and 2010-2011.
2. Architect-engineering contracts awarded during fiscal years 2009-2010 and 2010-2011.
3. Construction management contracts awarded during fiscal years 2009-2010 and 2010-2011.
4. Consulting contracts (e.g. accountant, audit, management consulting, insurance brokerage and risk management consulting, public affairs/outreach/communication and legal services) awarded during fiscal years 2009-2010 and 2010-2011.

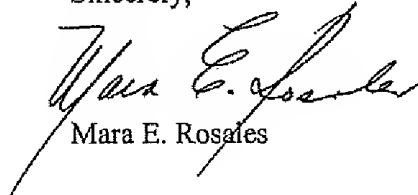
• African American Agenda Council • African American Contractors of San Francisco • Alliance for Equity • ASIAN, Inc. • Asian American Contractors Association • Asian Indian Association of America • California Hispanic Contractors Association • Council of Asian American Business Associations • Filipino Architects, Contractors & Engineers • San Francisco African-American Chamber of Commerce • San Francisco Women Contractors Association • Society of Hispanic Architects, Planners & Engineers •

Theresa Sparks
February 8, 2012
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The requested information is required to be maintained by the City pursuant to San Francisco Administrative Code Chapter 14B. We are particularly interested in all data referred to above, broken down by (1) ethnicity/gender of contractor/consultant; (2) prime vs. subcontractor/consultant tier; and (3) certified local business status.

We request that any applicable copying costs be waived. If costs are to be charged, please notify us before copying. If you have any questions, I may be reached at (415) 986-0523.

Sincerely,



Mara E. Rosales

MER:rg

cc: Mayor Ed Lee
Naomi Kelly, CAO